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Federal Communications Commission

DA 99-2632

DISPATCHED BY

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of:

Amendment of the Commission's Rules  
Regarding the 37.0 -- 38.6 GHz and  
38.6-40.0 GHz Bands

Implementation of Section 309(j) of  
The Communications Act -- Competitive  
Bidding, 37.0 -- 38.6 GHz and  
38.6 -- 40.0 GHz Bands

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) ET Docket No. 95-183 ✓  
) RM-8553  
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) PP Docket No. 93-253  
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## ORDER

Adopted: November 23, 1999

Released: November 23, 1999

By the Deputy Chief, Wireless Telecommunications Bureau:

1. On October 1, 1999, Cambridge Partners, Inc., AA&T Wireless Services, Stevan A. Birnbaum, Linda Chester, HiCap Networks, Inc., Paul R. Likins, William R. Lonergan, PIW Development Corporation, Cornelius T. Ryan, SMC Associates, Southfield Communications LLC, Video Communications Corporation and Wireless Telco (collectively, Movants), through their counsel, filed a Joint Motion for Stay (Motion)<sup>1</sup> of the effectiveness of recent Public Safety and Private Wireless Division (Division) dismissal actions and orders implementing the Commission's processing policy established in 1997<sup>2</sup> and affirmed in 1999,<sup>3</sup> concerning certain 38.6-40.0 GHz (39 GHz) Microwave Radio Service applications and related submissions. For the reasons that follow, Movants' Motion is denied.

2. The *sine qua non* for the grant of a motion for stay is a showing of irreparable injury that will result from the agency decision in the absence of injunctive relief.<sup>4</sup> Movants' sole claim of injury in their stay motion<sup>5</sup> is that current and continuing Division-level individual licensing actions and dismissal

<sup>1</sup>Joint Motion for Stay (filed Oct. 1, 1999) (Motion).

<sup>2</sup>Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd. 18600 (1997) (*Report and Order and Second NPRM*).

<sup>3</sup>Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands ET Docket No. 95-183, RM-8553; Implementation of Section 309(j) of the Communications Act--Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, PP Docket No. 93-253, *Memorandum Opinion and Order*, 14 FCC Rcd. 12428 (1999) (*July 29 MO&O*).

<sup>4</sup>See *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985) (*Reynolds Metals*); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum*); *Storer Communications, Inc.*, 101 FCC 2d 434, 451 (1985) (*Storer Communications*).

<sup>5</sup>Motion at 9.

orders concerning pending 39 GHz applications will result in irreparable harm if allowed to continue and Movants subsequently prevail on the merits in the case pending before the D.C. Circuit addressing those applications.<sup>6</sup> We find that such vague assertion is insufficient to justify injunctive relief as it fails to demonstrate an injury that is "certain and great . . . not theoretical."<sup>7</sup>

3. We are not persuaded that the types of injuries discussed in the Motion -- such as delays<sup>8</sup> and litigation costs<sup>9</sup> -- are sufficient to warrant a stay. In this connection, we note that economic loss "does not, in and of itself, constitute irreparable harm."<sup>10</sup> Movants' Motion is void of any specific discussion concerning the absence of adequate compensatory relief.<sup>11</sup> Moreover, if Movants wholly prevail in their judicial appeal of the Commission's decision, the Movants then would be put in the position they would have been in had the Division-level orders not been released.<sup>12</sup> In light of the above, we find that the Movants have not shown an injury warranting injunctive relief. Where, as here, Movants wholly fail to show that they will suffer irreparable injury in the absence of injunctive relief, the other requirements for a stay need not be considered.<sup>13</sup>

4. Accordingly, IT IS ORDERED pursuant to Sections 1 and 4(i) of the Communications Act, as amended, 47 U.S.C. §§ 151 and 154(i), that Movants' Joint Motion for Stay filed on October 1, 1999 is DENIED.

5. IT IS FURTHER ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), this *Order* is effective upon release.

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<sup>6</sup>See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidates Case Nos. 99-1361 and 99-1362) (D.C. Cir. 1999) (Appeals case).

<sup>7</sup>*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

<sup>8</sup>Motion at 2.

<sup>9</sup>*Id.* at 7.

<sup>10</sup>*Wisconsin Gas*, 758 F.2d at 674. See also *Virginia Petroleum*, 259 F.2d at 925 ("mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough").

<sup>11</sup>See *Reynolds Metals*, 777 F.2d at 762; *Virginia Petroleum*, 259 F.2d at 925; *Storer Communications* 101 FCC 2d at 451.

<sup>12</sup>See 47 U.S.C. § 402(h).

<sup>13</sup>*Wisconsin Gas*, 758 F.2d at 674.

6. This action is taken pursuant to delegated authority granted under Section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c), and Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

**FEDERAL COMMUNICATIONS COMMUNICATION**

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